# No. 6462

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and THOMAS WINKLER,

*Appellants,*

vs.

ANDREW F. MAHONY COMPANY, a Corporation, and FIDELITY-PHOENIX FIRE INSURANCE COMPANY, a Corporation,

*Appellees.*



## Brief of Amici Curiae on Behalf of Waterfront Employers of San Francisco, California.

**Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.**

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# Table of Contents.

# Table of Cases

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### INTRODUCTORY.

The question is one of the construction and proper application of the three subdivisions of Section 10 of the Long-

shoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. 901-50, 44 Stat. 1424).

The recent practice of the Deputy Commissioners in this and the Thirteenth Compensation Districts of applying subdivision (b) of Section 10 indiscriminately to practically all cases arising before them and measuring the compensation to be awarded to any particular claimant on the basis of the highest earnings of any longshoreman in the port where the injury occurs, without regard to the earnings of the particular claimant, has been disapproved not only by Judge Neterer in the instant case but also by the United States District Courts for the District of Oregon and for the Northern and Southern Districts of California. See

*Luckenbach Steamship Co. Inc. v. Marshall, et al.,* (D. Ore., 1931), 49 F. (2d) 625;

*Charles Nelson Co. v. Pillsbury, et al.,* (N. D. Cal. 1931) and connected cases, 48 F. (2d) 883;

*Pacific Steamship Company, et al. v. Pillsbury, et al.,* (S. D. Cal., 1931), 1931 A. M. C. 1243.

The appellant Deputy Commissioner, in making his award in the instant case, held that Section 10 of the Act requires that the claimant who actually earned during the year preceding his injury $1266.20 (which was approximately his average over a period of three years and the most which his industrial situation permitted him to earn), is entitled to have his compensation computed upon the basis of the earnings of another longshoreman, who, because of his greater personal capacity or higher "rank in the industrial hierarchy" was able, by dint of more

labor, to earn $2,314.45 during the same year. Nor does the holding stop there. Using a further mathematical formula found in the first two subdivisions of Section 10, the Deputy Commissioner raised the standard thus artificially selected from $2314.45 (the amount earned by the other workman) to $2445.00, by averaging the actual earnings of the other man over the number of days which he worked, 284, and multiplying the average daily wage by 300. The result of this mathematical magic was that claimant was awarded compensation at the maximum rate allowed by the statute, $25.00 per week, or $1300.00 per year, which is more than his annual earnings averaged over a period of three years, and more than he earned during the year preceding his injury; and this, though it is provided in another section of the Act (Section 8), also applicable *and controlling,* that in all cases of disability the weekly compensation payable shall be limited to *"66 2/3 per centum of the average weekly wages"* of the employee.

When it is considered that the principle embodied in the award now under consideration will result in giving to a majority of the injured longshoremen nearly or quite as much by way of compensation as they are capable of earning by their labor, and far in excess of the statutory percentage of 66 2/3 per cent, which was dictated by obvious reasons of policy, and to many longshoremen (such as this claimant) even more by way of compensation than they can earn in their occupation, thus providing an encouragement to malingering, the reason is apparent for the employers' concern relative the practice of the Deputy Commissioners in construing the Act.

We respectfully submit that the decision of the learned District Judge, based upon sound reasoning and amply fortified by authority, sets forth and explains the correct construction of Section 10.

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## STATEMENT OF THE PROPOSITIONS.

### I.

Subdivisions (a) and (b) of Section 10 of the Act "cannot reasonably and fairly be applied" in the cases of longshoremen. The 300-day rule prescribed in subdivisions (a) and (b) is a convenient mathematical formula to be used for computing average annual earnings in standard cases, which can only arise out of regular employment. Those subdivisions apply only to the case of a workman who works 300 days per year, that is, six days a week regularly for 52 weeks, holidays excluded, or at the rate of 300 days per year during the time that he is engaged in employment in the industry.

### II.

The "annual earning capacity" of claimant should have been determined under subdivision (c) of Section 10. Realizing that the standard prescribed in subdivisions (a) and (b) could not be applied to produce a fair result in cases where the claimant did not work at the rate of substantially 300 days per year, Congress prescribed a more elastic method for use in cases outside the scope of the standard, namely, subdivision (c).

III.

The Deputy Commissioner, having erroneously selected subdivision (b) for application, multiplied the error by resorting to the earnings of one who was distinctly *not* "in the same class" as claimant within the meaning of this section of the Act. The workman whose wages were taken as a standard consistently maintained an earning capacity double that of the claimant.

IV.

If the Act requires the construction placed upon it by the Deputy Commissioner, rather than that laid down by the District Court, then it deprives the employer of his property without due process of law and is repugnant to the Fifth Amendment to the United States Constitution.

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**HISTORY AND ORIGIN OF THE ACT.**

The Longshoremen's and Harbor Workers' Compensation Act was enacted by Congress March 4, 1927, and became effective July 1, 1927. As the decision of the District Court points out, the Congressional Record reveals what is really quite obvious from a comparison of the two, namely, that this Act was in substance an adoption of the Workmen's Compensation Act of New York. It follows under an unbroken line of decisions of the Supreme Court, from Chief Justice Marshall down to Justice Holmes, that the construction which had been placed on the New York Act by the New York courts prior to the passage of the

Federal Act will be presumed to have been adopted by Congress, together with the words of the earlier enactment.

*Hamilton v. Russel,* 5 U. S. (1 Cranch) 309, 316, 2 L. Ed. 118;

*Tucker v. Oxley,* 9 U. S. (5 Cranch) 34, 42, 3 L. Ed. 29;

*Interstate Commerce Commission v. B. & O. Railway Co.,* 145 U. S. 263, 284, 12 Sup. Ct. 844, 850, 36 L. Ed. 699;

*Sexton v. Dreyfus,* 219 U. S. 339, 344, 31 Sup. Ct. 256, 257, 55 L. Ed. 244.

The principle of adoption of the construction as well as the bare words of a statute is applicable where an act of Congress is patterned after the statute of a state. For example, in

*Willis v. Eastern Trust & Banking Co.,* 169 U. S. 295, 307, 18 Sup. Ct. 347, 352,

the Supreme Court said:

> "The resemblance between the provisions of the Massachusetts statute of 1860 and of the act of congress of 1864 is so remarkable that it is evident that the latter were taken from the former. This being so, the known and settled construction which those statutes had received in Massachusetts before the original enactment of the act of congress must be considered as having been adopted by congress with the text thus expounded. Tucker v. Oxley, 5 Cranch. 34, 42; Pennock v. Dialogue, 2 Pet. 1, 18; Railroad Co. v. Moore, 121 U. S. 558, 572, 7 Sup. Ct. 1334; Warner v. Railway Co., 164 U. S. 418, 423, 17 Sup. Ct. 147. In Railroad

> Co. v. Moore, just cited, where provisions of statutes of New York regulating judicial procedure had been incorporated by congress, in substantially the same language, in the legislation concerning the District of Columbia, it was held that congress must be presumed to have adopted those provisions as then understood in New York, and already construed by the courts of that state, and not as affected by the previous practice in Maryland, or in the courts of the District of Columbia.''

The rule was applied by this Court in

> *Welsh v. Barber Asphalt Paving Co.,* 167 Fed. 465, 472.

Section 10, with which we are here concerned, is worded precisely as was Section 14 of the New York Compensation Act of 1914, and the latter section has been the subject of frequent decisions by the courts of that state, which have fixed the construction and meaning of the words employed. Throughout the following discussion of cases bearing upon the construction of this section, in so far as the courts of New York have laid down rules of interpretation, those rules must be considered as having been adopted with the statute by Congress and, therefore, are of legislative authority, as binding upon the Federal courts as though expressly embodied in the Act itself. It was so held in

> *Texas Employers' Insurance Ass'n. v. Sheppeard,* 32 F. (2d) 300 (1929).

**SUBDIVISIONS (a) AND (b) OF SECTION 10 APPLY ONLY TO CASES OF EMPLOYEES REGULARLY ENGAGED FOR FIXED DAILY HOURS SIX DAYS A WEEK IN STEADY EMPLOYMENT.**

The leading New York case is

*Littler v. George A. Fuller Co.*, 223 N. Y. 369, 119 N. E. 554 (1918),

in which the New York Court of Appeals held that compensation should have been awarded on the basis of subdivision 3 of Section 14 of the New York Act (corresponding with subdivision (c) of Section 10 of the Federal Act), in view of the evidence that bricklayers in the locality averaged only about thirty weeks (180 days) employment per year. Under the authorities cited above, the following language of the Court of Appeal is as much a part of the Federal Act as though Congress had included it in the express enactment (119 N. E. 555):

> *"Three hundred days' work in the year is the standard of steady employment.* 'The average weekly wages of an employe shall be one fifty-second part of his average annual earnings.' Section 14, subd. 4. *The award should not exceed two-thirds of the earning capacity.* Average annual earnings are computed under subdivisions 1, 2 or 3 of Section 14, as the case requires. *If the nature of the employment does not permit steady work during substantially the whole of the year the annual earning capacity of the injured employe in the employment is the proper basis of compensation. Section 14, subd. 3. The true test is this: What were the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness?"* (Italics inserted.)

Further light is shed upon this general rule of construction by the following language from the opinion of the New York Supreme Court in

*In re Prentice,* 168 N. Y. S. 55 (1917):

"Subdivisions 1 and 2 of the section provide that in cases included within such subdivisions the average annual earnings shall consist of 300 times the average daily wage or salary. The number 300 used in those subdivisions, is not an arbitrary selection, but was evidently selected because it bears an approximately close relation to the number of working days in the year, Sundays and holidays excluded. *Manifestly, where an employee works seven days a week for substantially an entire year, the method of determining his average annual earnings, indicated in either subdivision 1 or 2, would be an injustice to him, just as much as it would be an injustice to the employer to apply those subdivisions to a case where the injured employe has worked less than six days a week for a substantial period of time.* The claim here falls more appropriately within subdivision 3. * * *" (Italics inserted.)

The Supreme Court of Michigan said, in

*Andrejwski v. Wolverine Coal Co.,* 148 N. W. 684 (Mich., 1914),

construing Section 11 of the Michigan Act then in force, which was practically identical with Section 14 of the New York Act and Section 10 of the Federal Act (p. 686):

"The question in the instant case for the court, upon the facts presented by this record, is to deter-

mine under the provisions of which of the four classifications of this statute the average annual earnings of this employee must be ascertained. It is clear that the first (corresponding to the introductory sentence of Section 10), second (corresponding to subdivision (a)), and third (corresponding to subdivision (b)) classes of cases relate to employments which continue during substantially the entire calendar year. About the first there is no question. The same initial language used in the second (a) and third (b) classifications indicates that the Legislature still had in mind employments at which employees worked substantially the whole of the year immediately preceding an injury. The employment in which the injured employee in the instant case was engaged at the time of his injury was not an employment of that character. It was not an employment in an industry which continued operations during substantially the entire year.

* * * * * * * *

"In our opinion, the 'methods of arriving at the average annual earnings of the injured employe' set forth in these classes 'cannot reasonably and fairly be applied.' We must therefore conclude that it comes within the fourth classification (corresponding to subdivision (c)).

* * * * * * * *

"In making these classifications which we have been considering, the known and recognized incidents of industrial employments were taken into consideration. The first three relate to employments wherein operations are carried on for substantially the entire year, and may be said to include the large majority

of industrial employments in the state. That there were well-known industrial employments within this jurisdiction which were not so operated must also have been within the knowledge of the legislative body. That such employments were recognized and provided for is apparent from the terms and provisions of the fourth classification." (Matter in parentheses interposed.)

In

*Mahaffey v. Industrial Accident Commission,* 176 Cal. 711, 713, 171 Pac. 298 (1917),

the Supreme Court of California, construing Section 17 of the California Act, which at that time was likewise in all material respects identical with Section 10 of the Federal Act, came to the same conclusion, saying:

> "*Both subdivisions 1 and 2 contemplate a kind of employment which is permanent and steady, and which, for that reason, affords to an employee the possibility, at least, of earning annually an amount measured by the number of working days in a year, estimated and fixed by the act at three hundred. Where this kind of employment is not shown to exist, the case falls within subdivision 3,* under which the annual earnings are to be taken as the sum which will 'reasonably represent the average annual earning capacity' of the employee 'in the kind of employment in which he was then working, or in any employment comparable therewith, but not of a higher class.' *Under this subdivision, the amount of annual earnings is not reached by multiplying the employee's daily earnings by any arbitrary figure, but by ascertaining from the evidence what*

*his earning capacity in fact was. The evidence before the commission did not show that Rees could have earned* in the employment in question or in any employment comparable to it, *anything more than the amount which he had actually earned in the past,* which was but a fraction of the amount fixed by the commission as his average annual earnings." (Italics inserted.)

And in

*Employers' Liability Assurance Corp. v. Figroid,* (1916) 3 Ind. Acc. Comm. of Cal., 46, 47,

the experienced California Commission applied the same principles to the case of a longshoreman:

"1. Where it is a matter of common knowledge that only a few persons in an entire trade or occupation work substantially the whole year it would be unfair and unreasonable to rate the average annual earnings of the entire trade on the basis of what some one or two or very few extremely fortunate persons might have been able to earn because those relatively few individuals did manage to get in two hundred seventy-five days or more. This would be a very serious over-rating of earnings and an injustice to the employer.

"2. Where an employee works every day in the week, as against the common custom of working only six days, and therefore gets in many more than three hundred days labor in the course of the year, it would be unjust and unfair to rate his earnings as they would be rated if he worked on a six-day basis.

"Therefore, whenever the Commission encounters cases of this kind, it declines to use the first or second

> methods of determining average annual earnings and determines them under the third method, * * *."

The Utah compensation statute simply prescribed as the basis of compensation "the average weekly wage," without any of the usual elaborate methods provided by other statutes for making this otherwise simple computation. The Utah Commission, however, adopted in practice the "300 rule" of the New York, Michigan, California and Federal Acts. This method was approved in

> *Uintah Power & Light Co. v. Industrial Commission,* 189 Pac. 875 (Utah, 1920),

a case in which "employment was in its nature continuous, throughout the year for every working day in the year." But in

> *State Road Commission v. Industrial Commission,* 190 Pac. 544, 546 (Utah, 1920),

the Utah Supreme Court set bounds to the use of this or any other arbitrary method of calculation, saying:

> "The rule adopted by the defendant in that case is reasonable and therefore permissible in every case where the employment is substantially continuous, even though the deceased is killed by an accident immediately after entering the employment.
>
> "*But where,* as in the instant case, *the employment in its nature is not continuous, but dependent upon certain conditions indeterminable in advance,* we know of no rule by which to determine the average weekly wage at the time of the injury except by adopting a method of computation which gives effect to the word

'average' as the same appears in the statute." (Italics inserted.)

The above are leading cases in the several jurisdictions whose Workmen's Compensation Acts have contained provisions identical with or closely similar to those of Section 10 of the Federal Act, and contain some of the most pertinent expositions of the principles which underlie the bare words of the statute. These provisions have, moreover, been the subject of frequent decisions in cases the facts of which are illustrative and applicable by analogy to the instant case. We think it proper, therefore, to present an analysis of the cases, classifying them according to the nature of the various employments under consideration, in order that their application to the instant case may be more readily apparent.

**A. Subdivisions (a) and (b) of Section 10 cannot reasonably and fairly be applied to employees engaged in regular but intermittent employment.**

In

*Remo v. Skenandoa Cotton Co.*, 179 N. Y. S. 46, 47 (1919),

where the claimant, a factory worker paid by the hour, worked no more than five days per week, the court held, reversing the Commission:

"As the claimant regularly worked no more than 5 days a week, the methods of calculation given in subdivisions 1 and 2 of section 14 of the Workmen's Compensation Law could 'not reasonably and fairly be

> applied'. Therefore the provisions of subdivisions 3 and 4 of that section, which require that the sum which 'shall reasonably represent the annual earning capacity' be taken as a basis, and divided by 52, to determine the average weekly wages, became applicable."

And, again, in

> *Belliamo v. Marlin-Rockwell Corp.,* 213 N. Y. S. 85 (1926),

where the claimant had worked throughout the year, but part of the time less than six days per week, the New York court says:

> "Although the claimant worked substantially the whole of the preceding year, during 16 weeks thereof he worked but 5 days per week and during 15 other weeks but 4 days per week. Subdivision 1 or 2 of section 14 of the Workmen's Compensation Law (Laws 1922, c. 615) cannot reasonably or fairly be applied. The average weekly wage should be computed under subdivision 3. Prentice v. New York State Railways, 181 App. Div. 144, 168 N. Y. S. 55; Limone v. Atlas Can Co., 202 App. Div. 862, 194 N. Y. S. 952."

Likewise, the arbitrary mathematical formula or "300-day" rule of subdivisions (a) and (b) of Section 10 of the Act could "not reasonably or fairly be applied" to the case of a longshoreman who worked less than six days a week (in the instant case less than 200 days in the year); especially where he did not even work a fixed or regular number of days each week.

**B. Subdivisions (a) and (b) of Section 10 cannot reasonably and fairly be applied to employees engaged in casual, irregular or discontinuous employment.**

For cases from the State of New York which substantiate the proposition stated in the foregoing heading, some of which have already been cited and quoted herein, please see:

*Littler v. Geo. A. Fuller Co.,* supra, p. 8;

*McDonald v. Burden Iron Co.,* 201 N. Y. S. 720, 722 (1923);

*Rooney v. Great Lakes Transit Corp.,* 180 N. Y. S. 652 (1920);

*Bassett v. Van de Bogart & Decker,* 225 N. Y. S. 20 (1927).

The case of

*Mahaffey v. Ind. Acc. Comm.,* 176 Cal. 711, 713 (1917), supra, p. 11,

is in accord.

In line with the decision in the *Andrejwski* case, supra, from that state, the Supreme Court of Michigan has several times had occasion to hold that the "300 rule" could not be applied with reason and fairness where the casual, irregular or discontinuous nature of the employment prevented the claimant from working substantially 300 days per year. Cases so holding are:

*De Mann v. Hydraulic Engineering Co.,* 159 N. W. 380, 381 (1916), (Where claimant, a laborer, worked "when they had work" totaling about 260 days in the year, the third subdivision of the Michigan Act should be applied.);

*Campbell v. Cummer-Diggens Co.,* 171 N. W. 395 (Mich., 1919).

In

*Texas Employers Ins. Assn. v. Mitchell,* 27 S. W. (2d) 600 (Tex., 1930),

the claimant, a seamstress, who was a piece-worker, received pay checks for 46 of the 52 weeks preceding her injury. In the statement of facts the court said (p. 602):

> "It was admitted * * * that the output of the plant was not of that quantity to provide her work enough for the whole of each day, but only partly so during the twelve months previous to the time of the injury. She made up bundles as frequently as she had the piece work to do."

The Texas court held, in view of the fact that the claimant

> "was not paid a daily wage or a salary but was paid compensation by the piece or garment, * * * first subsection 5 instead of first subsection 1 would rule the computation of the compensation. * * * Therefore, Mrs. Mitchell's average weekly wages were 1/52 part of the amount of the annual wages found by the jury."

As previously pointed out herein, the Utah Industrial Commission, under the Compensation Act of that state, had adopted and applied in practice the so-called "300 day" rule.

In

*State Road Commission v. Industrial Commission,* 190 Pac. 544 (1920),

the Supreme Court of Utah held that where irregularity was one of the incidents of the employment, the average weekly wage should have been struck in such a way as to

take it into account. It was there held that the Commission erroneously applied the 300-day mathematical formula, the court saying (p. 546):

> "Undoubtedly the Legislature intended that the person injured, or his dependents in case of death, should be compensated for the loss upon some basis having a logical relation to his earnings in the employment. It certainly was not intended that, in every case where death resulted from accident in the course of employment, the dependents should be compensated as if the employment were continuous during all the working days of the year."

See, also, quotations from the last mentioned case, supra, p. 13.

And in

> *Utah Fuel Co. v. Industrial Commission,* 201 Pac. 1034 (1921),

the Utah Supreme Court disapproved application of the 300 day formula where the employment permitted claimant to work intermittently throughout the year a total of 222 days during that time. A portion of the opinion reads as follows (p. 1036):

> "The basis assumed by plaintiff is not just in that the period of employment is too restricted while *the basis adopted by the Commission is unfair because it assumes that Parry could have worked 300 days in the year while under the undisputed evidence he could only have worked 222 days.* Under the plaintiff's theory Parry's average weekly wage was too low, while under the Commission's theory it was too high, since it assumed that Parry would earn wages during 300 days, which he could not do. * * *

"While the employment in this case somewhat partakes of the nature of a seasonal employment, yet it is not such in fact. *It is merely an intermittent or irregular employment which continues in that way more or less throughout the entire year.* The whole year must, therefore, be considered in order to arrive at a fair average of the employe's earnings. *If the employe is injured and is thus prevented from earning wages, he loses precisely what he could have earned, and is entitled to 60 per cent of his earnings unless the 60 per cent exceeds the maximum allowed by the act.*" (Italics inserted.)

And see

*Danzy v. Crowell etc. Co.*, 134 So. 267, 269 (La., 1931).

We submit that the appellants herein can offer no sound reason to the Court why the principle enunciated in the foregoing authorities should not apply with equal force to the case of a longshoreman, whose work, it is true, continues throughout the year but is of a casual, irregular and discontinuous character during all of the time.

**C. Subdivisions (a) and (b) of Section 10 cannot reasonably and fairly be applied to employees engaged in seasonal employment.**

*Gruber v. Kramer Amusement Corp.*, 202 N. Y. S. 413, 414, 415 (1924):

"Claims which come within section 14, subdivisions 1 and 2, arise in continuous 'employment.' * * * Under subdivision 3, if either of the above subdivisions cannot reasonably and fairly be applied, his 'annual earnings' shall be the sum which reasonably represents his 'annual earning capacity' in the em-

ployment in which he was working at the time of the accident. This subdivision covers claims which arise in seasonal employment as well as other claims."

*Kittle v. Town of Kinderhook,* 212 N. Y. S. 410, 416 (1925):

"The repair of highways in this climate is a seasonal occupation, at most during six or seven months of the year, and the men employed do not work or receive pay for rainy days. * * * the compensation could only be calculated under section 14, subd. 3."

*Deverso v. Parsons,* 225 N. Y. S. 78 (1927) syllabus:

"Claimant, who customarily picked cherries and peas, husked corn, cut seed potatoes, and picked up potatoes for different employers for not exceeding seven months in each year, *held* not engaged in such 'employment' for 'substantially' the whole year, and compensation for injuries should have been computed under Workmen's Compensation Law, sec. 14, subd. 3, relating to seasonal occupations, and not under subdivision 2, on basis of earnings of other employees of same class in the same or similar employment, and her earnings in different kinds of employment should not be considered; 'employment' meaning the kind of employment, and not work for any particular employer."

Other New York cases holding that the third subdivision (corresponding with subdivision (c) of Section 10) applies if the employment be seasonal in character, are:

*Burg v. Henry P. Burgard Co.,* 204 N. Y. S. 686 (1924);

*Darby v. New York Canners Co.,* 212 N. Y. S. 795 (1925);

*Kapler v. Camp Taghconic, Inc.,* 213 N. Y. S. 160 (1926);

*Blatchley v. Dairymen's League Coop. Ass'n.,* 232 N. Y. S. 437 (1929);

*Orlando v. Snider Packing Corp.,* 246 N. Y. S. 224 (1930).

The Supreme Court of Maine has held, under a section of the Maine compensation act identical with Section 14 of the New York Act and Section 10 of the Federal Act, that where the employment was seasonal there was no basis for the application of the first or second subdivision and that the third was properly applied.

See

*Scott's Case,* 118 Atl. 236 (Maine, 1922).

The Supreme Court of Michigan considered that the Industrial Accident Board of that state was in error in applying the "300 rule" to the case of claimants engaged in seasonal employments.

*Cramer v. West Bay Sugar Co.,* 167 N. W. 843 (Mich., 1918);

*Kirchner v. Michigan Sugar Co.,* 173 N. W. 193 (Mich., 1919).

From Wisconsin there comes a similar holding construing a similar statute.

*Rainbow Gardens v. Industrial Commission,* 202 N. W. 329 (Wis., 1925).

The principle underlying the holdings in the foregoing cases involving seasonal employments is the precise principle of construction for which appellees contend in the

instant case: 300 days work per year is the standard of steady employment; the mathematical formula, or 300-day rule, in subdivisions (a) and (b) of Section 10 of the Act can only be applied with reason and fairness to the case of an employee who works at that standard rate throughout the year, or at an equivalent rate during a portion of the year where he has been in that employment less than a year; subdivision (c) should be applied in all those cases which fall outside the scope of the standard.

The same principle governs where the claimant can obtain work only during certain seasons of the year and where he can obtain employment for a portion only of each week throughout the year. In either case he works less than the standard of steady employment. For whatever reason he works less than the standard, his compensation should not be computed on the basis of a standard working year where he is unable, because of the nature of the industry, or for any reason, to secure that standard of employment. Manifestly, then, the seasonal occupation cases are directly in point in the instant case.

**D. Subdivisions (a) and (b) of Section 10 cannot reasonably and fairly be applied to an employee engaged in an employment which does not afford to him approximately 300 days of regular work per year.**

(1) *These subdivisions cannot apply to workmen averaging more than six days per week.*

In

*In re Prentice,* 168 N. Y. S. 55 (1917),

the court pointed out that the 300-day standard of subsections 1 and 2 has reference to the normal number of

working days per year of a man in steady employment and cannot reasonably or fairly be applied any more to a man working seven days per week than to one working less than six. See quotation, supra, p. 9.

In

*Howard v. Texas Employers' Ins. Ass'n,* 292 S. W. 529 (1927),

the Texas Court, construing a similar statute (Rev. Stats., 1925, Article 8309), held that the first and second subdivisions could not "practicably" be applied in computing compensation of an employee who had worked regularly seven days per week for more than a year preceding his injury.

In

*Petroleum Casualty Co. v. Williams,* 15 S. W. (2d) 553 (1929),

where it was held that it was not practicable (because not just or fair) to apply the first or second subdivisions to the case of an employee who had worked 363.6 days during the immediately preceding year, the Texas Commission of Appeals said:

> "We are further of the opinion that *substantially a year,* within the meaning of subdivisions 1 and 2, is exactly 300 days or close to, or near to 300 days. It may be slightly more than 300 days or slightly less than 300 days. That is to say *substantially a year* means a year or about a year, or so near a year as to be a year for all practical purposes. A reading of the three subdivisions together, and a viewing of the same in the light of the entire act, will show any other construction will lead to confusion."

See, also,

*Employers' Liability Assurance Corp. v. Figroid,* supra, p. 12.

(2) *They cannot apply to workmen averaging less than six days per week.*

*In re Prentice, supra,* p. 9 (N. Y., 1917)

(less than 6 days per week for a substantial period);

*Littler v. Geo. A. Fuller Co.,* supra, p. 8 (N. Y., 1918)

(30 weeks);

*Remo v. Skenandoa Cotton Co.,* supra, p. 14 (N. Y., 1919)

(5 days per week, though 12 hours a day);

*McDonald v. Burden Iron Co.,* supra, p. 16 (N. Y., 1923)

(40 weeks);

*Kittle v. Town of Kinderhook,* supra, p. 20 (N. Y., 1925)

(7 months);

*Beliamo v. Marlin-Rockwell Corp.,* supra, p. 15 (N. Y., 1926)

(5 days per week);

*Deverso v. Parson,* supra, p. 20 (N. Y., 1927)

(7 months);

*Geroux v. McClintic-Marshall Co.,* 233 N. Y. S. 402, 403 (N. Y., 1929)

(200 days):

*Scott's Case,* supra, p. 21 (Maine, 1922)

(7 months);

*Andrejwski v. Wolverine Coal Co.,* supra, p. 9 (Mich., 1914)
(211 days);

*DeMann v. Hydraulic Engineering Co.,* supra, p. 16 (Mich., 1916)
(260 days);

*Employers Liability Assurance Corp. v. Butler,* 20 S. W. (2d) 209 (Tex., 1929),
(228 days);

*Texas Employers' Ins. Ass'n v. Mitchell,* supra, p. 17 (Tex., 1930)
(46 weeks in succession, but irregular time for each week);

*Utah Fuel Co. v. Industrial Commission,* supra, p. 18 (Utah, 1921)
(222 days);

*Bragg's Quarry v. Smith* (Tenn.), 33 S. W. (2d) 87 (1930), affd. 34 S. W. (2d) 714 (1931)
(3 days a week).

Thus, the authorities demonstrate that the 300-day formula laid down in the first and second subdivisions cuts both ways and can neither be applied to the prejudice of an employee who has averaged substantially more than the 300-day standard nor to the prejudice of an employer in an industry which did not require the services of the employee for the standard working year of 300 days, because to apply it in either of these cases would be "unreasonable" and "unfair". In prescribing the 300-day rule, the Act has set up a convenient formula

for computing average annual earnings in standard cases, which can only arise out of regular employment. This standard, like any other standard, will only operate to produce a fair result in cases of the type which the legislature had in view in fixing the standard. This the legislature recognized, and accordingly prescribed in addition a more elastic method for use in cases outside the scope of the standard, namely, subdivision (c).

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**THE LONGSHOREMAN'S EMPLOYMENT IS INHERENTLY CASUAL AND DISCONTINUOUS AND THEREFORE NOT WITHIN THE INTENDED SCOPE OF THE FIRST AND SECOND SUBDIVISIONS OF SECTION 10.**

The record in this case presents a picture of conditions inherent in the nature of longshoring as it is carried on in all ports of the world. The extremely casual and irregular character of this employment has often been judicially recognized.

In

*Perry v. Wright* (1908), 1 K. B. 441, 459, 462,

Lord Justice Fletcher Moulton, addressing himself to a case involving the ascertainment of the basis for computing compensation of a longshoreman, said:

> "Let me take, for example, a person who is employed by one employer only, but is employed by him in a discontinuous manner—say, for example, a man who is employed to assist in working a ferry on market days or when the river is high, an employment which requires him to be ready to work when called

upon, but does not employ him for a fixed period per week. If such a man were paid by the day his average weekly earnings would be the totality of his earnings during the relevant period divided by the number of weeks in that period. His normal week would not be a week in which he was employed through the whole of the six days, but would be a week in which he was employed for an average time. And this would be just and equitable, because the fact that the work was discontinuous, and that he was only being paid when he worked, would regulate the rate of wages. *His wages during the days in which he was employed must cover and remunerate him for the enforced unemployment of the intervening period. Similarly the average weekly earnings of a charwoman would not be six times her daily charge; because it would be an incident of her employment to be employed only on so many days in the week as she could find jobs, and the effect of this discontinuity would generally be to make her average week include some idle time.*

* * * * * * * *

*"The workman was a casual dock labourer, and there is no dispute as to the rate of payment which such workmen obtain during the time that they are employed. But the employment is a casual one. The men go to the stand and are taken on for a job, and when that job is over they are discharged, and remain idle for a time or get engaged by some other employer who wants workmen.* It is common ground that the workman in question was not in the habit of working for the respondents any more than for any other firm, but took a job, if he wished one, wherever he could find it.

> "Under those circumstances I am satisfied that the case comes within the proviso of s. 2 (a) by reason of *the casual nature of the employment* and otherwise." (Italics inserted.)

*Cue v. Port of London Authority* (1914), 3 K. B. 892, 895, 899, 904,

was a similar case of a "casual dock laborer" employed as a corn porter. Cozens-Hardy, M. R., said:

> "What we have to ascertain as best we can is what were the average earnings or would have been the average earnings of this man during the previous three years. *We cannot ascertain that in the same way as we should where a workman has been employed for three years under a contract for so many shillings a week.*" (Italics inserted.)

See, also,

*Snell v. Mayor of Bristol* (1914), 2 K. B. 291, 294, 296,

where the Master of the Rolls and the President considered a stevedore was engaged in casual labor.

Likewise the California Commission, in *Employers' Liability Assurance Corp. v. Figroid,* supra, p. 12, after making a thorough investigation, found this casual and irregular condition of employment to exist throughout the longshoring industry.

THE INTERPRETATION CONTENDED FOR BY COMPLAINANTS WOULD LEAVE ROOM FOR THE APPLICATION OF SUBDIVISIONS (a) AND (b) TO A NUMBER OF CLASSES OF REGULAR EMPLOYEES ENGAGED IN MARITIME EMPLOYMENTS SUCH AS TO COME WITHIN THE INTENDED SCOPE OF THESE SUBDIVISIONS.

If it be urged that the argument which would preclude the application of subdivisions (a) and (b) to longshoremen goes too far in that it leaves no room for the operation of these provisions, the answer is two-fold. In the first place the history of the Act shows that it was taken from the statute books of New York, a great industrial state in which the usual condition of employees is that to which these provisions are appropriate: regular employment for a fixed number of hours per day six days per week, and the decisions of that State have confined the application of those two subdivisions to such employment. Secondly, the Act, as adopted by Congress, is not intended to apply solely to longshoremen but to many other classes of employees as well, which is indicated by the title "Longshoremen's *and Harbor Workers'* Compensation Act." Many of these various classes of Harbor Workers are employed as regularly as are factory hands, and this may be illustrated by reference to decisions of the courts and opinions of the Employees' Compensation Commission as to what classes of employees come within the Act.

In

*Employers' Liability Assurance Corp. v. Cook*, 281 U. S. 233, 50 Sup. Ct. 308, 74 L. Ed. 823 (1930),

the Supreme Court held that a state Workmen's Compensation Act could not apply to an employee of the Ford Motor

Company incidentally assisting in the unloading of a vessel in navigable waters, and it would follow that such an employee would be entitled to compensation under the Longshoremen's and Harbor Workers' Act, section 3 (a).

The Employees' Compensation Commission has held that employees of business concerns who come aboard ship to deliver supplies, to collect or deliver the ship's laundry, or to solicit orders for materialmen or supplymen, are within the Act.

*U. S. E. C. C. Opinion No. 8,* 1927 A. M. C. 1561.

Similarly are the shore staffs of steamship companies, including fleet engineers, port captains and even office employees, so long as they are on board for some business connected with the ship,

*U. S. E. C. C. Opinion No. 12,* 1927 A. M. C. 1567,

and employees of customs house brokers, insurance adjusters and investigators,

*U. S. E. C. C. Opinion No. 26,* 1928 A. M. C. 406,

and cruise directors employed by travel companies,

*U. S. E. C. C. Opinion No. 19,* 1928 A. M. C. 256.

It seems unnecessary further to multiply illustrations of the great variety of employees to which these provisions may apply. The court may draw upon its own knowledge for this purpose. See

*Wingard v. Industrial Accident Commission,* 57 Cal. App. 674, 207 Pac. 1030,

in which the California District Court of Appeal took judicial notice of the fact that there are such harbor workers so engaged in regular employment throughout the year.

When we consider the great number and variety of employees who come under the Act, and work regularly six days a week throughout the year, such as the foregoing examples, and the ship repair workers (also covered by the Act even when on a drydock—33 U. S. C. A., Sec. 903), to all of whom subdivisions (a) and (b) are applicable, it is apparent that there are a great many cases where these subdivisions properly come into operation.

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**THE ONLY REASONABLE AND FAIR METHOD OF COMPUTING COMPENSATION FOR INJURY TO OR DEATH OF LONGSHOREMEN IS TO DETERMINE THE ANNUAL EARNING CAPACITY UNDER SUBDIVISION (c).**

This subdivision, instead of prescribing an arbitrary mathematical formula such as that provided by the first two subdivisions for employees who work with mathematical regularity, leaves it to the Commissioner's good sense and discretion to determine what the individual's "annual earning capacity" in fact was, having regard to his own record of earnings as indicating his individual qualifications and disqualifications, to the earnings of others comparable to him, and to the general condition of the industry, i.e., what prospect it afforded of employment to the man in question.

There are two sides to any man's "earning capacity." One is what may be called the subjective side, that is, the capacity of the individual, and on this side it is indeed important to know whether or not the employee was

"ready, able and willing" to work. But there is another side, the objective side, which must equally be taken into consideration: the nature and condition of the industry and the opportunity which it affords to the individual to exercise his readiness, ability and willingness to work, for without opportunity capacity is fruitless.

This industrial law of supply and demand has been recognized by courts which have had to deal with the industrial problem presented by the instant case. The endeavor of the courts has been so to construe the statute law that it may not conflict with the industrial and economic law. The leading case is

*Anslow v. Cannock Chase Colliery Co., Ltd.*, (1909) App. Cas. 435, 437.

A coalheaver claimed compensation under the English Act, which prescribed as a basis for computation "average weekly earnings". He had only worked a total of thirty-three full weeks during the year preceding his injury. Of the remaining nineteen, fourteen represented normal stoppage of operations; two, public holidays; two, illness; and one, vacation. The House of Lords held that, the object of the Act being to compensate for loss of normal earning capacity, the divisor to be applied to the total earnings should include, in addition to the number of weeks actually worked, the fourteen weeks' stoppage and the two weeks' public holidays, which were normal incidents of the employment and therefore affected the claimant's earning capacity therein; not, however, the two weeks' illness and one week's voluntary holiday, for these did not bear upon his capacity to earn. The Lord Chancellor said:

"The question is in regard to the way in which the average weekly earnings of a workman shall be computed in a case in which a normal and recognized incident of his work was fourteen weeks' stoppage and two weeks of general holidays during the year.

"The object of the Act broadly stated is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident. *If he takes a holiday and forfeits his wages for a month, then that does not interfere with what he can earn. It is only that for a month he did not choose to earn.* So, too, if there be a casualty accidentally stopping the work. *But if it is a part of the employment to stop for a month in each year, then he cannot earn wages in that time in that employment, and his capacity to earn is less, over the year.*

"I agree with what the learned Master of the Rolls says in his judgment when he uses the following language: 'In my opinion the true test is this: What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked.' " (Italics inserted.)

*Perry v. Wright,* supra, p. 26,

was decided upon the same principle, holding that in determining a longshoreman's earning capacity due consideration should be given both to the casual nature of his employment and to his own individual qualifications and disqualifications, including the fact that the particular workman

"was a man of poor physique owing to drink and did not stick to his work."

In

*White v. Wiseman,* (1912) 3 K. B. 352, 357,

the Master of the Rolls, Cozens-Hardy, pointed out that:

> *"It is an incident of this employment that the man who was never discharged from work should get in some weeks more and in some weeks less pay, having regard to the state of trade and other circumstances."*

Farwell, L. J., said that the learned county court judge had "completely overlooked" the element of discontinuousness.

Kennedy, L. J., went on to say:

> "The question as I understand it as to which this appeal is brought is whether or not, in calculating this average which the statute directs the court to arrive at in fixing the rate of compensation, the learned judge was right in disregarding, as he has done, the period during which in one week and in another the workman came to his employer's place but found that there was not sufficient work to enable him to earn that which, if he had been fully supplied with work, he would have earned. That was, as shown by the weeks of full work, a great deal more than he earned in what I will call the lean weeks, such sums, for instance, as 25s. and 26s., as compared with 9s. and 9s. odd. *Is the workman in the calculation of the compensation entitled to say, 'I was there ready to do the work and capable of doing the work, and I earned so much less because my employer happened not to have the work to do'?* Or, as it is put in terms by the learned county court judge, is

the tribunal entitled to disregard the weeks when the workman was out of employment through no fault of his own, in order to arrive at the proper division of the total wages, or not? *With great respect I do not think that that is a perfectly correct statement of the facts, because the list shows that, except for three weeks which were, as I understand it, holiday weeks, there were no working weeks, if I might call them so, in the trade when this man was entirely out of employment.* He earned less in the number of weeks scattered over the twelve months' period because of want of work which he could do. With that qualification, taking the position put by the learned judge, he proceeds to say, 'This absence of work was due, I think, to fortuitous circumstances and was in no sense a normal and recognized incident of the employment.' There I differ from him. It is the ordinary case of any employer who from time to time has more work or less work to give the workmen who attend his factory or his shop, and there was nothing special, there was nothing fortuitous, in the proper sense of the term and according to the definition which appears, I think, in more than one judgment, but which certainly appears in the judgment of Fletcher Moulton, L. J., and in the general statement of the law which precedes that judgment in the cases which are grouped together under the name of *Perry v. Wright.* * * * *I take it to be a normal and recognized incident of most employments that a man takes the risk of getting more or less work as his employer has it. It is not the case of anything sudden or unexpected.* * * * *I think that the error of the judgment of the learned county court judge lies, to put it in one sentence, in treating as something outside the normal incidents of the work the fact that there is less to*

*divide in one week than in others in the ordinary way of business.''* (Italics inserted.)

See, also, the following English cases indicating various elements which should properly, and under subdivision (c) may, be taken into consideration:

*Cain v. Frederick Leyland & Co., Ltd.,* (1908) 1 K. B. 441, 444.

(*Average earnings of other employees of the same grade,* ''there being no evidence to show that Cain was better or worse than an average man''.)

*Carter v. John Lang & Sons,* 16 Sc. L. T. 345, 348 (1908).

(Element of discontinuousness.)

*Edge v. J. Gorton, Ltd.,* (1912) 3 K. B. 360.

(Particular qualifications and disqualifications of the claimant are to be considered.)

*Barnett v. Port of London Authority,* (1913) 2 K. B. 115.

(Disqualification of the claimant in not getting a ticket which would have entitled him to preference. On the other hand, his particular skill.)

*Snell v. Bristol Corporation,* (1914) 2 K. B. 291.

(Claimant's qualifications, his actual earnings, *the average earnings of his class.*)

*Cue v. Port of London Authority,* (1914) 3 K. B. 892.

(''Regard must be had to that personal equation * * * as well'' as earnings of other employees in the *same grade or class.*)

The sensible principles laid down in the *Anslow* and other English cases have been recognized and followed in this country as well. In addition to the many authorities from New York and other states, previously cited and quoted herein, we call attention to the following cases:

> *Centralia Coal Corporation v. Industrial Commission,* 130 N. E. 725, 726 (Illinois, 1921).

The employee in that case was a miner, who for some time preceding his injury had been working under abnormal circumstances, removing slate for which he was not paid along with coal for which he was. After discussing the English cases, the court said:

> "*If Sundermeyer was unable to earn the average amount earned by miners in the mine of plaintiff in error by reason of his own inability or lack of industry, he is not entitled to have his compensation computed upon a basis of the average earnings of miners in that mine. To hold him so entitled would be to place a premium upon idleness and inefficiency.* The case is different, however, where his inability to earn as much as the average miner in the mine is not due to his fault, or to the fact that he is below an average miner, but is due to a condition under which he is put to work by his employer, which is not a normal and recognized incident of the employment." (Italics inserted.)

As was well said in the instant case:

> "Earning capacity means fitness and readiness and willingness to work, considered in connection with *opportunity* to work; and *fitness* and *opportunity*

must go hand in hand. Claimant was ready and fit, and risk of opportunity was his."

The fallacy of the rule adopted by the Deputy Commissioner is clearly exposed by the common sense of the Michigan court, expressed in the following language from *Andrejwski v. Wolverine Coal Co.,* supra, 148 N. W. 684, 687:

"To charge this employment with compensation for injuries to its employes on the same basis as employments which operate during substantially 300 days in the year would be an apparent injustice, *as such compensation would be based on the theory of impossible earnings by the employe in that employment* which operated upon the average a trifle over two-thirds of a working year. *This was recognized and provided for by the legislature by omitting from the fourth classification any requirement relative to the average daily wage or salary of an injured employe.*" (Italics inserted.)

Arbitrary mathematical rules are convenient, and may operate justly, in organized industries where the workmen are so many cogs in the machine, working by clock or whistle, day in and day out. But the mechanization of modern life is not yet complete. There are still some classes of workmen who preserve a measure of independence, preferring to offer their labor from day to day in the market place of casual tasks. Such are longshoremen, and the market for their labor is the waterfront, where ships from everywhere come in with cargoes which must be moved without delay, and in a

few hours are gone again, leaving the longshoremen to return to the market place and await another call for their labor.

To such irregular and casual relations between employers and employees no arbitrary rules can be applied with justice in computing compensation. This has been the observation of the British courts:

> "The word 'impracticable' in the act must mean impracticable to arrive at a fair computation; *for it is never impracticable to make some arithmetical calculation with some result, but if, as here, it would be very unfair, it becomes impracticable.* * * *" (Italics inserted.)
>
> (Per Lord Justice Farwell in *Jury v. Owners of S.S. "Atlanta"*, (1912) 3 K. B. 366, 369.)

> "I do not think that the question of the shortness of time being practicable or impracticable to reckon an average can be settled by a mere question of figures. It must be settled in each case by a consideration of the whole circumstances of the employment."
>
> (Per Lord Dunedin in *Carter v. John Lang & Sons*, 16 Sc. L. T. 345, 348 (1908); 1 B. W. C. C. 379, 391.)

The legislature, also, realized this and provided the elastic measure of subdivision (c) to take care of just such irregular employments. It is subdivision (c) which embodies the fundamental principle of the section, as of the Act itself, *compensation for 2/3 of loss in earning capacity,* and by the very words of this subdivision Congress has shown its intention that the arbitrary rules of

subdivisions (a) and (b) shall yield to the principle of (c) in any case of conflict. As the Master of the Rolls (Cozens-Hardy) said in

*Perry v. Wright* supra, (1908) 1 K. B. 441, 452:

> "In all cases in which accurate mathematical compensation is impracticable, the object aimed at should be to estimate what I may call the normal rate of remuneration of the injured man. *That is the main overriding idea, and to this idea every doubtful suggestion must yield.*" (Italics inserted.)

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**THE DEPUTY COMMISSIONER MULTIPLIED THE ERROR IN THE INSTANT CASE BY SELECTING AS A STANDARD THE EARNINGS OF ANOTHER WORKMAN WHO WAS NOT IN THE SAME CLASS AS THE CLAIMANT.**

We are convinced for the reasons already given that subdivision (b) should not be applied in computing the average annual earnings of a longshoreman in any case. Moreover, it is clear that the Deputy Commissioner did not heed the admonition of the statute, that the employee whose wages are taken as the standard must be "of the same class" within the employment as the claimant.

The provision and intent of both subdivisions (b) and (c) are the same; that if lack of evidence as to the claimant's or decedent's own earnings makes it necessary to look to those of a fellow workman, then the choice should be of one "in the same class" so as to provide a reasonable and fair standard of computation. The record shows that M. Diegnan, whose wages were taken by the Deputy Com-

missioner as a standard for determining the compensation of claimant, earned on the average over $2000 for the three preceding years (Exhibit 3, p. 32), while claimant earned on the average during the same period less than $1300 per year (Exhibit 3, p. 35). During the year immediately preceding the injury to claimant, M. Diegnan earned in excess of $2300 and claimant less than $1300.

In taking the earnings of another workman as a guide, the Deputy Commissioner should certainly have selected one of comparable qualifications, ambition and capacity for work and, what is the resultant of these factors, comparable earning capacity. But all these elements were ignored by him.

To determine the compensation of claimant with a demonstrated earning capacity of less than the sum which he receives by way of compensation, the Deputy Commissioner selected for a standard the earnings of another, of double the earning capacity and, in fact, the man with the highest earnings record of all the Seattle longshoremen. The District Court condemns the failure of the Deputy Commissioner to adhere to the classification plainly required by the statute, and correctly does so, we submit, in the following language:

> "And to classify the claimant, of average annual earning capacity of $1266.20 in the same work, under subdivision (b) on a basis of $2445.00, is obviously not within the intent of the Act."

The proposition that all men are not in the same class merely because they are all longshoremen seems quite self

evident. Moreover, there are authorities directly in support.

In

*Barnett v. Port of London Authority,* (1913) 2 K. B. 115,

it was held by the Court of Appeal that longshoremen were of different classes though they all engaged in the same kind of work and received the same hourly rate of pay when at work. As the court there said, they "were employed at the same work but not in the same grade" and the trial court (corresponding to the Deputy Commissioner) erred in not taking into account the disability inherent in being without a "ticket" which put the claimant in a class distinct from the "B casuals".

Similarly in

*Cain v. Frederick Leyland & Co. Ltd.,* (1908) 1 K. B. 441, 444,

claimant was classified as a casual shipwright, as distinguished from a regular shipwright, and in

*Edge v. J. Gorton, Ltd.,* (1912) 3 K. B. 360,

a carter was held to be in a class distinct from a teamster.

*Gillen v. Ocean Acc. & Guarantee Corp.,* 102 N. E. 346, 347, 348 (Mass., 1913),

a longshoreman's case, turned upon the provision of the Massachusetts Act requiring that compensation be computed with regard to the average weekly wage earned by other longshoremen "in the same class of employment and in the same district." The court said:

"Although not stated in precise words, we think that the general import of the Act is to base the remuneration to be paid upon normal rate received by workmen *for the grade of work in which the particular workman may be classified.*" (Italics inserted.)

In

*Deverso v. Parsons,* supra, 225 N. Y. S. 78,

the court said (p. 80):

"*Subdivision 2 makes a distinction between classes of employees working in the same employment.* This claimant was one of a particular class of employees, not 'the same class' with a general farm hand. She was doing part time work; she never did the work of a general farm hand."

The New York Supreme Court considered that the distinction between classes of employees should turn directly upon their respective earning capacities, though all were engaged in a common occupation as "stampers". The Presiding Justice said in

*Adams v. Boorum & Pease Co.,* 166 N. Y. S. 97, 100 (1917):

"The claimant, when injured, was a stamper, and the basis of his compensation is the prevailing wages of a stamper in the same class, as stated in the section. Hence it is for the Commission to determine whether, under the circumstances applying to this or a neighboring place, the claimant is in the class of workmen who are receiving $22 a week, or in a class only receiving $15 to $17 a week."

See, also,

*Blatchley v. Dairymen's League Coop. Assn.,* 232 N. Y. S. 437 (1929).

An illustration of the proper application of provisions such as contained in subdivision (b) is furnished by

*Thibeault's Case,* 111 Atl. 491 (Maine, 1920),

where the claimant had been a weaver for about six months preceding the injury. The court held that the section of the Maine Act, such as subdivision (b) of the Federal Act, should be applied. It was held that the earnings of a fellow-employee whose wage scale was in evidence and who was also a weaver, working in the same workroom with claimant, receiving wages at the same piece rate, doing the same amount of work, working the same regular hours, six days a week, subject to the same contingencies of rush or slack work, and, therefore, "of the same class" as claimant, could be used as a guide. The only actual loss of time to either of the workmen resulted from a fortuitous circumstance—cancellation of Government contracts following the close of the World War.

Other District Courts within this Circuit have also disapproved the present practice of the Deputy Commissioners of completely ignoring the plain requirement of the Act with respect to classification. See

*Pacific Steamship Co., et al, v. Pillsbury, et al.,* (S. D. Cal., 1931), 1931 A. M. C. 1243;

*Charles Nelson Co. v. Pillsbury, et al,* (N. D. Cal., 1931) and connected cases, 48 F. (2d) 883.

In the two cases just cited, particularly the former, it is true that the record shows quite definitely a classification of longshoremen based upon preferences, priorities and the nature of longshoring work performed. But the classification based upon earning capacity is also real, and the

District Court in the instant case correctly exposed the error of disregarding it.

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**IF SECTION 10 REQUIRES THE APPLICATION MADE OF IT BY THE DEPUTY COMMISSIONER IN THIS CASE, THEN THE ACT IS UNCONSTITUTIONAL.**

The District Court points out the serious constitutional question that would arise under the construction adopted by the Deputy Commissioner. So plainly inequitable and unreasonable is the result reached by the Commissioner, and so obviously arbitrary the method of computation whereby it was reached, that we feel certain the employers should, if pressed to the point, invoke against it the protection of the United States Constitution (Fifth Amendment) as a taking of property without due process of law. We submit that the entirely arbitrary measurement of one employee's "compensation" for a loss in his earning capacity, not by his own earnings (though these be known) or any other standard having reasonable relation to his loss, but by the earnings of another man in a different and higher class and of double the earning capacity of the claimant, deprives the employer of its property without due process of law, in that it is compelled to pay, ostensibly to compensate the employee for two-thirds of the loss in earning capacity suffered by the employee in the industry, an amount wholly disproportionate to the extent of that loss.

In so far as the award exceeds the injury, it is a mere gratuity or unemployment dole. It amounts to making the

industry compensate the workman, *not only for the injury,* which it has caused to him, *but also for a misfortune which is common to both employee and industry*—slackness of trade and consequent lack of work to be done.

> "Such a method of computation is self-destructive."
>
> *Hight v. York Mfg. Co.,* 100 Atl. 9, 10 (Maine, 1917).

The purpose of the Act clearly appears from the substantive provisions of Section 8 and is to compensate longshoremen and other harbor workers to the extent of two-thirds of the loss in earning power suffered by them in the service of the industry; no more and no less.

Section 10 is not substantive. It is intended merely to prescribe a convenient method of ascertaining the average weekly wages as a basis for applying Section 8. But if the method prescribed by Section 10 be so ill-contrived as the result reached by the Commissioner here would indicate, and such as to go far beyond the substantive rights created and the scheme of compensation established by Section 8, and to operate arbitrarily and unreasonably by the establishment of a standard of compensation having no relation to the injury which the Act was intended to compensate, then in the most material sense it must be said that the Act takes the employer's property without due process of law.

Due process means process reasonably calculaed to effect a proper legislative object. A process of computation as arbitrary as that employed by the Commissioner in this case will not pass that inexorable test of the Constitution. This is borne out by a line of decisions in the United States

Supreme Court sustaining various compensation acts and indicating at the same time the constitutional limitation beyond which such acts may not go.

"The fifth amendment," said the Supreme Court in the

*Second Employers' Liability Cases, (Mondou v. N. Y., N. H. & H. R. Co.,* 223 U. S. 1, 32 Sup. Ct. 169, 176, 56 L. Ed. 327),

"condemns what is done * * * when it is without any reasonable basis, and * * * is purely arbitrary."

"Of course," said the Supreme Court again, in

*New York Central R. Co. v. White,* 243 U. S. 188, 202, 206, 37 Sup. Ct. 247, 252, 253, 254, 61 L. Ed. 667, 675,

"we cannot ignore the question whether the new arrangement is arbitrary and unreasonable * * *. It is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute *a reasonable amount, and according to a reasonable and definite scale,* by way of compensation for *the the loss of earning power* incurred in the common enterprise, * * *.

*"This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. * * * Any question of that kind may be met when it arises."*

So in

*Mountain Timber Co. v. Washington,* 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685,

the Supreme Court said that the Fourteenth Amendment would not preclude the states from adopting a compensation scheme under which employers were required "to contribute reasonable amounts and *according to a reasonable and definite scale* by way of compensation for loss of earning power."

Likewise, in

*Arizona Copper Co. v. Hammer,* 250 U. S. 400, 429, 39 Sup. Ct. 553, 559, 63 L. Ed. 1058,

the court indicated that if compensation is to be assessed according to "some prescribed scale" that scale must be "reasonably adapted to produce a fair result."

It is obvious that the Deputy Commissioner in this case, by a very arbitrary process, reached a very unreasonable and unfair result; while the District Court outlined a sensible and sound process leading to a reasonable and fair result. We feel that this constitutional question can and should be avoided by affirming the construction placed upon these standard provisions by the District Court, which construction is firmly established by the state court decisions and was indeed adopted with the words of the Act by Congress. But still we must repeat, that if there is not something wrong with the way in which the Deputy Commissioner construed and applied the Act in order to reach the result which he did in this case, then there is something fatally wrong with the Act itself. There seems no escape

from the conclusion: either the correct construction of the Act requires the annulment of this arbitrarily computed award, or the Constitution does.

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**GUNTHER v. UNITED STATES EMPLOYEES COMPENSATION COMMISSION.**

The Employees Compensation Commission, during the first three years of operation of the Act, acted upon the departmental construction that the arbitrary mathematical formula involved in subsections (a) and (b) of Section 10 could not "reasonably and fairly be applied" to the case of employees who did not work "substantially the whole year," or at an equivalent rate during such part of the year as they followed their occupation.

Accordingly, in any such situation, the Deputy Commissioner applied subdivision (c), determining the actual "annual earning capacity" of the claimant by considering first his own performance, and secondly, that of others "in the same class."

The reversal of this departmental construction followed the decision of this Court in

*Gunther v. U. S. E. C. C.*, 41 F. (2d) 151 (1930).

In that case the appeal was presented on the assumption that the Deputy Commissioner was correct in applying subdivision (c); the controversy being whether he had properly determined the "annual earning capacity" under the evidence introduced at the hearing. No accurate and

complete record of Gunther's earnings was shown, such as that proven of the claimant in this case. Gunther's dependents contended on appeal that the Deputy Commissioner had arbitrarily followed the employer's partial record of earnings and had disregarded the uncontradicted testimony of other witnesses as to the decedent's average earnings. The testimony so disregarded was that of another longshoreman who had earned $2100 in the year preceding decedent's death, that he had at some times worked with decedent and that "they both earned practically the same money," and of another witness that decedent "had steady employment, and his earnings would average $40 per week."

This Court said that subdivision (b) should have been applied and also that the Deputy Commissioner erred in his practical interpretation of subdivision (c).

We submit that the real basis of the decision in the *Gunther* case was that the Deputy Commissioner did not properly apply subdivision (c). This is clearly indicated by the following extracts from the opinion:

> "his (claimant's) ability to earn should be the primal basis of determining compensation * * *.
>
> "Where the award is made under subdivision (c) actual earnings are not controlling, but the conclusion to be arrived at is a sum which 'shall reasonably represent the annual earning capacity'.
>
> "It is clear in this case that the $893.96, taken as the basis for computing appellant's compensation, did not 'reasonably represent the annual earning capacity' of the decedent, * * *.

> "An employee for some reason may have been unable to have worked at any employment for all or the greater portion of the year preceding an accident. He may meet with an accident the first day of his employment. In such case his prior lack of earnings or of earning capacity, particularly the reason therefor, while a proper matter to be considered in determining his earning power at the time of the accident, nevertheless, *it is that earning power which is the ultimate fact to be determined in the manner prescribed by the statute.*" (Italics inserted.)

Now, there is nothing in subdivision (b) relative "annual earning capacity" but that is the very language contained in subdivision (c) and the precise measure for computing compensation prescribed in the latter subdivision.

The result actually arrived at in the *Gunther* decision could only have been reached by application of subdivision (c). The only testimony of earnings of another employee was that relating to the other longshoreman (Witt). If the decision ultimately was made to rest on an application of subdivision (b), taking the earnings of this other longshoreman (Witt) as a standard, then the decision would be founded on this fallacious reasoning: The claimant Gunther did not work substantially the whole year but the witness Witt did work substantialy the whole year, though both were working at their occupation during the whole year, and yet the earnings of Witt are a proper standard because the two worked approximately the same number of days during the year and "earned practically the same money".

We submit that the *Gunther* decision has been erroneously construed by the Commission and that it lends no support to the present astounding departmental construction of the Act. It is our belief that this Court would have given no sanction for the application of subdivision (b) had there been a record before the court such as there is in this case, explaining in great detail the nature of the longshoring industry, the manner of employment of longshoremen, and the wide spread in earning capacity which results from personal attributes as well as from preferences, priorities and grading in the industrial organization. We further submit that there is nothing in the *Gunther* decision which opposes the construction of Section 10 as contended for by the complainants in this case and as required by evidence herein which was not before the Court in that case.

There was certainly no language in the *Gunther* decision to warrant the Deputy Commissioner here or in other cases in disregarding the admonition in both subdivisions (b) and (c) that he whose earnings are taken as a guide for measuring the compensation of claimants must be a workman "*of the same class.*" This Court made quite plain in its opinion that the workman whose earnings were taken as a standard in the *Gunther* case, was "of the same class" as the decedent, that is, a longshoreman who worked with the decedent and earned "practically the same money." The court continued to point out that the $893.96 did not "represent approximately the amount of wages which 'an employee of the same class working substantially the whole of such immediately preceding year * * * shall have

earned in such employment during the days when so employed'."

In the case now under review, we have the Deputy Commissioner, in determining the average annual earnings of claimant, deliberately selecting as a standard the average annual earnings of another longshoreman who consistently demonstrated double the earning capacity of the claimant.

It is only where the application of subdivision (b) will reach a fair and reasonable result that it can be applied at all. Obviously, then, that subdivision cannot be applied reasonably or fairly to the case of an employee engaged in an employment which does not afford to him substantially 300 days of work per year, because in any such case the operation of the 300-day formula will result in an artificially increased and wholly fictitious computation of his earnings. This unfair and unreasonable result is aggravated where, after erroneously selecting that subdivision for application, the 300-day rule is put into operation with respect to the earnings of one in a distinctly different and higher class in the employment. We are convinced that the decision in the *Gunther* case does not warrant either of the unreasonable stages by which the Deputy Commissioner reached the astounding result which he did in this case.

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## CONCLUSION.

We respectfully submit that the "300 rule," or formula, of subdivisions (a) and (b) of Section 10 cannot reasonably and fairly be applied to determine the average annual

earnings of longshoremen, because of the casual, irregular and discontinuous nature of the employment. Those subdivisions cannot be so applied to employees who do not regularly work at the standard of steady employment, that is, six days a week, or at the rate of 300 days per year. The annual earning capacity of such employees should be determined under the elastic provisions of subdivision (c). This construction, approved by the District Court, avoids any question of validity of the Act; while the Deputy Commissioner adopted a construction which would render the Act repugnant to the Constitution.

Moreover, wherever the earnings of one employee are taken as a standard by which to determine the earnings of another, the two must be "in the same class" within the employment. To be "in the same class," they must have at least similar qualifications, ambitions and opportunities in the employment, and similar earning capacities. This requirement was completely overlooked by the Deputy Commissioner here, and the District Court disapproves such oversight.

We respectfully submit that the order and judgment of the District Court is proper and should be affirmed.

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